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Supreme Court of the United States

OCTOBER TERM, 1974.

No. 74-1245

LIBERTY MUTUAL INSURANCE COMPANY,
A CORPORATION,
Petitioner,

vs.

SANDRA WETZEL, AND MARI ROSS, ON BEHALF OF THEMSELVES AND ALL OTHERS SIMILARLY SITUATED,
Respondents.

BRIEF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AS AMICUS CURIAE IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

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INTEREST OF THE AMICUS CURIAE.*

The Chamber of Commerce of the United States of America is a federation consisting of a membership of over thirty-seven hundred (3,700) state and local chambers of commerce and professional and trade associations, a direct business membership in excess of thirty-eight thousand (38,000) and an underlying membership of approximately five million (5,000,000) business firms and individuals. It is the largest association of business and professional organizations in the United States.

In order to represent its members' view on questions of im-

* Consents of all parties for the participation of the *amicus* have been filed with this Court.

portance to their vital interests and to render such assistance as it can to the Court's deliberations in such areas, the Chamber has frequently participated as *amicus curiae* in a wide range of significant labor relations matters before this Court and has participated as an *amicus* in the court below. *E.g., Geduldig* v. *Aiello, et al.*, 417 U. S. 484 (1974); *Griggs* v. *Duke Power Company*, 401 U. S. 424 (1971); *Connel Construction Company, Inc.* v. *Plumbers and Steamfitters Local Union No. 100, etc.*, No. 73-1256; *Boy's Markets* v. *Retail Clerks Union*, 398 U. S. 235 (1970); *H. K. Porter Co.* v. *N. L. R. B.*, 397 U. S. 99 (1970); *Sears Roebuck and Co.* v. *Carpet Layers, Local 419*, 397 U. S. 655 (1970); *Super Tire Engineering Co., et al* v. *McCorkle, et al.*, ... U. S. ....., 85 LRRM 2913 (April, 1974).

There are issues in this case that are of major importance to the Chamber's members: whether an employer may exclude maternity and related conditions from his disability program without being guilty of illegal sex discrimination under Title VII of the Civil Rights Act of 1964, (42 U. S. C. Sections 2000e to 2000e-15) and what deference is due to the Equal Employment Opportunity Commission's new maternity guidelines. These issues are matters of national concern because most employers have maternity benefit policies, and most employers come within the provisions of Title VII of the Civil Rights Act. Further, the collective bargaining agreements of a substantial number of these employers contain provisions concerning the payment of fringe benefits. The Chamber is, thus, vitally concerned that these questions be properly resolved.

The issues presented here are, as well, issues of first impression. Because of its broad representation of employers, the Chamber is in a position to present arguments to this Court which might not otherwise be advanced by the parties.

Indeed, as stated, the Chamber participated as an *amicus curiae* in *Geduldig* v. *Aiello, supra*, before this Court, and it appears from reading this Court's *Aiello* opinion that the Chamber's arguments were carefully and favorably considered.

SUMMARY OF ARGUMENT.

The crucial issue here is whether an employer may exclude maternity and related conditions from his disability program without being guilty of illegal sex discrimination under Title VII. This issue has been propelled into national prominence not only by the expanded coverage of Title VII and the fact that most employers have illness or benefit plans, but also due to this Court's recent decision in *Geduldig* v. *Aiello, supra.*

The *amicus* submits that the *Aiello* analysis is apposite to and dispositive of the issues presented here since it is logically sound to find that interdicted discrimination because of sex can exist under Title VII only when it occurs under the Fourteenth Amendment. Indeed, a comparison of *Aiello* and this Court's decision in *Phillips* v. *Martin-Marietta Corp.*, 400 U. S. 542 (1971) demonstrates that the variables employed to determine whether proscribed sex discrimination exists are identical whether the Fourteenth Amendment or Title VII is involved. Under these decisions, there can be no prohibited sex discrimination unless men and women, otherwise similarly circumstanced, are unequally treated solely because of sex. That is, unequal treatment between different categories of the same sex is not interdicted discrimination because of sex. Following *Aiello's* rationale, the terms of an insurance program which exclude pregnancy alone from a list of compensable disabilities do not constitute interdicted sex discrimination since benefits nonetheless accrue to members of both sexes with no exclusion from benefit eligibility because of gender. That is, whatever unequal treatment may exist in such an insurance program occurs between different categories of the same sex; there is no risk from which men are protected and women are not.

Furthermore, it is submitted, consonant again with *Aiello's* rationale, that where the exclusion of pregnancy benefits is the

result of a rationally based conscious choice to afford benefits to men and women that would otherwise be unavailable at a minimum cost, this exclusion cannot violate Title VII, unless independent evidence demonstrates that the denial of pregnancy coverage is a pretext intended to accomplish proscribed discrimination.

In addition to the foregoing, this case presents an issue that permeates many Title VII cases: under what circumstances should courts defer to the Equal Employment Opportunity Commission's guidelines. There is need for this Court to again address this issue since many courts have failed to adhere to the teaching of *Griggs* and *Espinoza*[1] that the Commission's guidelines are entitled to weight only if the conclusion is inescapable that they comport with Congressional intent. When this standard is applied, the guideline involved in the instant cause (Section 1604.10, adopted 1972), is entitled to no weight, and therefore the court below erred in deferring to the Commission's view of Title VII.

Accordingly, the Petition presents issues of national importance affecting virtually all employers covered by Title VII.

1. *Griggs* v. *Duke Power*, 401 U. S. 424 (1971); *Espinoza* v. *Farah Mfg. Co.*, 414 U. S. 86 (1973).

ARGUMENT.

THE EXCLUSION OF PREGNANCY BENEFITS FROM AN INSURANCE PROGRAM DOES NOT INHERENTLY CONSTITUTE PROSCRIBED SEX DISCRIMINATION.

The Chamber contends that an employer should not be required by Title VII to provide benefits for pregnancy on the same terms as he provides benefits for illness or injury. Furthermore, the Chamber urges that the EEOC's guideline containing this requirement is invalid and entitled to no weight by this Court.

The *amicus* draws cogent support for his position from this Court's decision in *Geduldig* v. *Aiello, supra*. There, this Court held that a state disability insurance program may exclude from coverage disability caused by normal pregnancy and childbirth without violating the Equal Protection Clause of the Fourteenth Amendment. The Chamber asserts that the *Aiello* Court's analysis is apposite to and dispositive of similar issues arising under Title VII.

A. The Exclusion of Pregnancy Benefits Does Not Affect Women in an Area Where They Are Similarly Situated With Men.

As this Court in *Aiello* recognized explicitly there can be no prohibited sex discrimination unless men and women, otherwise similarly situated are unequally treated solely because of sex. That is, unequal treatment between different categories of the same sex is not proscribed discrimination because of sex. It necessarily follows, as the *Aiello* Court held, that excluding pregnancy from a benefit plan is not interdicted sex discrimination inasmuch as this exclusion does not affect women in an area where they are similarly circumstanced with men. In reach-

ing this conclusion, this Court expressly rejected the position urged by the dissenters in *Aiello*. Thus, fundamental to the dissenters' position was the premise that the exclusion of a gender-related disability, such as pregnancy, *per se* amounted to proscribed sex discrimination.[2] In repudiating this view, the *Aiello* Court held instead that California's benefit plan did not violate the Fourteenth Amendment, though pregnancy was excluded, since under the plan ". . . there is no risk from which men are protected and women are not." (417 U. S. at 496-497)

There is nothing in *Aiello* that suggests that this Court's analysis of what may in fact constitute prohibited sex discrimination is inapplicable when Title VII, rather than the Fourteenth Amendment, is involved. On the contrary, the observations in *Aiello* endorse the Chamber's view that proscribed sex discrimination under Title VII can occur only in those circumstances where it would arise under the Fourteenth Amendment. Thus, in *Aiello* this Court recognized that the terms of an insurance program which excluded pregnancy alone from the list of compensable disabilities did not constitute interdicted sex discrimination since benefits nonetheless accrued to members of both sexes with no exclusion from benefit eligibility because of gender. (at 496-497, n. 20) That is, whatever unequal treatment existed occurred between different categories of the same sex; there was no risk from which men were protected and women were not. *Aiello* did not restrict these observations to plans funded by a state. Moreover, it is apparent that the conclusions concerning the legitimacy of California's insurance program reasonably apply with equal vitality when private benefit programs which exclude only pregnancy from compensable disabilities are examined to determine whether or not prohibited sex discrimination exists. That is, since the question is first one of *fact*, it is logically sound to find that interdicted discrimination be-

2. The dissenters stated ". . . dissimilar treatment of men and women, on the basis of physical characteristics inextricably linked to one sex, inevitably constitutes sex discrimination." (417 U. S. at 501)

cause of sex can exist under Title VII only when it occurs under the Fourteenth Amendment.

Consequently, the attempt by the court below and the Second Circuit[3] to distinguish *Aiello because* that case did not involve private insurance plans and Title VII must fail. To simply state this difference does not demonstrate any reason to hold *Aiello's* analysis of insurance plans inapplicable to Title VII cases, and neither the decision below nor that of the Second Circuit has offered such a demonstration.

Following the rationale of *Aiello*, then, whether the validity of a pregnancy exclusion is contested under Title VII or the Fourteenth Amendment, rules concerning benefits relating to pregnancy do not affect women in an area where they are similarly circumstanced with men. Accordingly, deprivation of maternity benefits does not *per se* constitute proscribed dissimilar treatment for men and women who are similarly situated whether Title VII or the Fourteenth Amendment is involved.[4]

3. *Communication Workers of America* v. *A. T. & T. Co. Long Lines Department*, ... F. 2d ..... (CA 2, March, 1975).

4. A comparison of this Court's *Aiello* and *Phillips* v. *Martin Marietta Corp.* (400 U. S. 542, 1971) decisions demonstrates that the variables employed to determine whether proscribed sex discrimination exists are identical whether Amendment Fourteen or Title VII is involved. Thus, as stated, *Aiello* recognized that there can be no prohibited sex discrimination unless men and women, otherwise similarly situated, are unequally treated solely because of sex. Similarly, *Martin* held that under Title VII there can be no proscribed sex discrimination unless men and women who are otherwise equally qualified for the same job are treated unequally solely because of sex: "Section 703 (a) of the Civil Rights Act of 1964 requires that persons of like qualifications be given employment opportunities irrespective of their sex."

Furthermore, had Congress intended to enlarge the area of sex discrimination to embrace areas where men and women were not similarly circumstanced, it would have specifically done this following the *Martin* decision and expressly rejected the rationale of that decision. Congress has done this in the past when it reacted to the *Dewey* v. *Reynolds Metal Co.* (429 F. 2d 324 (CA 5, 1970)) decision by amending in 1972 the Civil Rights Act of 1964 to reflect a view contrary to that expressed by that court, and to require employers to adjust their schedules to accommodate the religious practices of their

B. Pregnancy, Just as Any Other Physical Disability, May Be Excluded from Insurance Coverage on Any Reasonable Basis.

In addition to holding the California plan valid for reasons set forth in part A of this brief, this Court in *Aiello* found that when an insurer advances a reasonable basis for excluding a physical disability from coverage, this exclusion is not inherently interdicted sex discrimination even though the excluded condition affects only one sex. In reaching this conclusion, this Court has recognized that the insurer has a reasonable and legitimate interest in utilizing available benefit funds effectively and in maintaining contribution rates at a level that will not burden those who require insurance coverage.[5] Thus this Court observed that where the inclusion of pregnancy and maternity benefits will result in increased premiums or decreased benefit payments for other covered disabilities, the exclusion of pregnancy cannot automatically be attributed to proscribed sex discrimination.

As this Court explained in *Aiello*:

> "While it is true that only women can become pregnant, it does not follow that every legislative classification concerning pregnancy is a sex-based classification like those considered in *Reed, supra,* and *Frontiero, supra.* Normal pregnancy is an objectively identifiable physical condition with unique characteristics. *Absent a showing that distinctions involving pregnancy are mere pretexts designed to effect an invidious discrimination against the members of*

employees. Congressional silence at a time when amendments to the Civil Rights Act where under consideration must be taken as demonstrating Congress' approval of this Court's rationale in *Martin.*

5. This Court has stated in its *Aiello* decision: "The State has a legitimate interest in maintaining the self-supporting nature of its insurance program. Similarly, it has an interest in distributing the available resources in such a way as to keep benefit payments at an adequate level for disabilities that are covered, rather than to cover all disabilities inadequately. Finally, California has a legitimate concern in maintaining the contribution rate at a level that will not unduly burden participating employees, particularly low-income employees who may be most in need of the disability insurance." 417 U. S. at 496

> *one sex or the other, law-makers are constitutionally free to include or exclude pregnancy from the coverage of legislation such as this on any reasonable basis, just as with respect to any other physical condition.*" at 496, note 20. (emphasis added).

The Chamber believes that this aspect of *Aiello,* like that discussed in part A, *supra,* is equally apposite to the similar issues arising under Title VII in this case. In *Aiello,* the Court upheld the exclusion of pregnancy since this exclusion was rationally related to the State's legitimate cost saving interests in maintaining an efficient insurance program. There is no logical reason to subject private insurers to a more stringent test when the legality of an exclusion of pregnancy related disabilities is at issue. Rather, since both the Fourteenth Amendment and Title VII represent interdictions against discrimination, the test to determine whether these proscriptions have been violated should be identical absent an explicit expression from this Court manifesting a contrary intent. Such an enunciation is absent here.

Futhermore, inasmuch as the objective of both state and private insurers is to construct a comprehensive benefit program at a minimal cost, it follows that the test of legitimacy also should be equivalent whether the Fourteenth Amendment or Title VII is involved.[6] To read *Aiello* as not applying to private

6. There can be no doubt that the development of the equal employment opportunity law under Title VII of the Civil Rights Act of 1964 has been significantly affected by concepts first enunciated in equal protection cases involving education, voting or other civil rights. *See e.g., Griggs* v. *Duke Power Co.,* 401 U. S. 424 (1971) (citing *Gatson County* v. *United States,* 395 U. S. 285 (1969), re-educational disadvantage and voting standards); *Contractors Ass'n of Eastern Pa.* v. *Secretary of Labor,* 442 F. 2d 159 (CA 3), *cert. denied,* 404 U. S. 854 (1971) (citing *Porcelli* v. *Titus,* 302 F. Supp. 726 (D. N. J. 1969), *aff'd.,* 431 F. 2d 1254 (CA 3, 1970), *cert. denied,* 402 U. S. 944 (1971), and *Norwalk CORE* v. *Norwalk Redevelopment Agency,* 395 F. 2d 920 (CA 2, 1968) re the appropriateness of color conscious remedial action in public school employment and in public housing matters); *Jones* v. *Lee Way Motor Freight, Inc.,* 431 F. 2d 245 (CA 10, 1970), *cert. denied,* 401 U. S. 954 (1971) (citing *Alabama* v. *United States;* 304 F. 2d

insurers would produce the anomaly where a state, possessing manifold resources from which to obtain funds, nevertheless would be permitted to exclude pregnancy from its benefit program as too costly, while a private insurer lacking such resorts could be required to endure the exorbitant cost of coverage or to terminate utterly his benefit program.[7]

It is, therefore, overly simplistic to conclude that by excluding a condition occurring only to one sex from his benefit program, an employer without more unlawfully discriminates against that sex. Rather following the rationale underpinning the *Aiello* decision, where the exclusion of pregnancy is the result of a *rationally based conscious choice* to afford benefits to men and women that would otherwise be unavailable at a minimum cost, this exclusion cannot violate Title VII, unless independent evidence demonstrates that the denial of pregnancy coverage is a pretext intended to accomplish proscribed discrimination.

The *Aiello* rationale is in harmony with previous decisions of this Court. That is, on analysis, *Griggs* v. *Duke Power Co.*, 401 U. S. 424 (1971), while frequently cited by plaintiffs in Title VII

583 (CA 5), *aff'd. mem.*, 371 U. S. 37 (1962), re the significance of statistical evidence showing that blacks had not served on juries in areas in which blacks constituted a substantial part of the population); *Papermakers Local 189* v. *United States*, 416 F. 2d 980 (CA 5, 1969), *cert. denied*, 397 U. S. 919 (1970) (citing *Louisiana* v. *United States*, 380 U. S. 145 (1965), and other cases, re facially neutral standards in voting registration as perpetuating past discrimination). Thus, the constitutional and statutory precedents have been basically merged. Now that Title VII has been made applicable to the employment practices of state and local governments by the Equal Employment Opportunity Act of 1972, the need for consistency in the principles applicable to public and private employers is even more apparent. *See Cleveland Board of Education* v. *LaFleur*, 414 U. S. 632, 6 F. E. P. Cases 1253, 1256 n. 8 (January 21, 1974).

7. In California, it appears that approximately 10% of the disability insurance there written is administered by private employers. These employers are required by California law to provide benefits identical to or greater than those provided by the state. Unless *Aiello* applies to private insurers, the state will be permitted to exclude pregnancy from its plan while a private insurer who models his plan after the state's may be denied this right. Such a result would be grossly inequitable.

proceedings, is in accord with the *Aiello* decision and with the positions herein asserted. There, in *Griggs*, the employer required as a condition of employment that applicants have a high school education or that they pass a standardized general intelligence test. These requirements operated to disqualify Blacks at a substantially higher rate than white applicants. Because these requirements were not shown to be related to the successful performance of the job for which the applicants were being considered, this Court held that the employer violated Title VII by maintaining these requirements, even though the employer did not intend to discriminate against Blacks. This Court stated that, "If an employer practice which operates to exclude Blacks cannot be shown to be related to job performance, the practice is prohibited." (at 431.)

While this Court in *Griggs* found that the requirements *were unrelated to measuring job performance, and, therefore, discriminatory*, this Court stated that nothing in the Act prevents an employer from using tests which relate to job performance, and employers may require applicants to be fit for the job. In *Jefferson* v. *Hackney*,[8] this Court amplified and interpreted this aspect of *Griggs*. This Court stated, at 549:

> "We have, however, upheld the findings of nondiscriminatory purpose in the percentage reductions used by Texas, and have concluded that the variation in percentages is

8. 406 U. S. 535 (1972). *Jefferson* involved a state's determination to allocate a fixed pool of welfare money by paying AFDC benefits at 75% of need while paying other insurance programs at a higher percentage, e.g., old age assistanse at 100% of need and aid to blind at 95% of need. AFDC recipients challenged this determination by alleging racial discrimination, since the proportion of AFDC recipients who were black or Mexican-American was higher than the proportion of aged, blind or disabled welfare recipients who fell within these minority groups. This Court found no invidious discrimination under the Fourteenth Amendment and said racial discrimination was not proven. This Court did not substitute its judgment for the State's determination on how best to allocate the welfare money, even though different policy judgments were possible, because the State's conclusion that the aged and infirm were less able to bear the hardships of an inadequate living standard than were the young AFDC recipients was reasonable.

> *rationally related* to the purpose of the separate welfare programs. The Court's decision in *Griggs* v. *Duke Power Co.*, 401 U. S. 424 (1971), is therefore inapposite. In *Griggs*, the employment tests having racially discriminatory effects were found not to be job related, and *for that reason were impermissible under the specific language of Title VII of the Civil Rights Act*. Since the Texas procedure challenged here *is related* to the purposes of the welfare program, it *is not* proscribed by Title VI simply because of the variances in the racial composition of different categorical programs." (Emphasis supplied.)

In both *Griggs* and *Jefferson* the challenged procedures had racially discriminatory effects. The job testing procedure in *Griggs* violated Title VII because it was not related to job performance. In *Jefferson* the differences in benefit payments did not violate Title VI because it could be reasonably said that these differences in payment were related to the the legitimate purposes of the welfare program.[9] *Griggs, Jefferson* and *Aiello* have an apparent consistency: when conduct challenged as discriminatory has a demonstrated relationship to legitimate goals, it will not automatically be found to have violated the Constitution or equal opportunity statutes.

Here, just as in *Aiello,* the pregnancy exclusion is related to the legitimate design of the insurance program. Thus, it must be kept in mind that when an employer has only a finite amount of money to expend on coverage for employees of both sexes, he must be accorded the right to determine how to utilize those funds most effectively for the benefit of all. Exclusions based

9. In *Jefferson,* a Title VI case, this Court utilized a test virtually identical to that employed in *Griggs* involving Title VII to determine the legitimacy of challenged conduct. The logic of this consistency is evident since whether challenged conduct is related to legitimate objectives is a question of fact, and therefore it is reasonable to employ the identical criteria to resolve this question whether Title VI or VII is involved. Similarly, the question of whether employer conduct amounts to proscribed sex discrimination is first one of fact. Accordingly, it is logically sound to find that prohibited sex discrimination under Title VII can occur only in those circumstances where it would arise under Amendment Fourteen.

solely on the variables of cost and comprehensiveness of coverage should not rationally and automaticelly be attributed to prohibited sex discrimination. Rather, consistent with the rationale of *Aiello,* where there is a *reasonable basis* to exclude maternity benefits from benefit programs, the exclusion cannot violate Title VII unless unlawful motive is demonstrated by independent and unequivocal evidence.[10]

Furthermore, while *Griggs* required that employers justify their challenged conduct by showing business necessity, that standard should not be applied in this case. In the first place, *Griggs* involved discrimination between *different* races; in the area of maternity fringe benefits the sexes are not similarly situated and, as *Aiello* held, and Part A of this brief contends, a policy excluding maternity benefits does not, therefore, constitute illegal sex discrimination. Second, the effect of the employment requirements in *Griggs* was to deny a large segment of the population of a North Carolina county employment opportunities. These requirements caused discrimination and had a pervasive effect against virtually the entire black population of that county because they did not have the educational background to meet the employer's requirements. Here, just as in *Aiello,* the exclusion from benefit programs of maternity benefits adversely affects only a portion of one sex some of the time while at the same time having a salutary effect on members of that sex generally as well as on all other employees. Just as in *Aiello* and unlike *Griggs,* the exclusion here is the result of a conscious choice to reduce the plan's costs and therefore to afford other benefits to both women and men which would be otherwise unavailable. Indeed, the cost increase to employers occasioned by the addition of disability income benefits to cover pregnancy is of such dramatic consequence that exclusion of these benefits

10. *Local 189 United Paper Makers and Paper Workers* v. *United States,* 416 F. 2d 980, 992 (CA 5, 1969) quoted in *Newmon* v. *Delta Air Lines,* 374 F. Supp. 238, 7 F. E. P. Cases 26 (N. D. Ga. 1973). "[W]hen the defendant's conduct evidences an economic purpose there is no discrimination under Title VII . . ."

logically cannot be equated with unlawful discrimination unless unlawful motive is clearly shown.[11]

C. The EEOC's Sex Discrimination Guidelines Are Invalid and Are Entitled to No Weight.

1. Aiello Repudiated These Guidelines.

This Court's opinion in *Aiello* indicates that it will not uphold the EEOC's guidelines that mechanically equate differential treatment of pregnancy with statutorily proscribed sex discrimination.[12] Thus, the *Aiello* dissent expressly relied upon these guidelines to support *its* contention that the mere exclusion of disabilities inextricably linked to one sex inevitably constitutes sex discrimination. As stated, the majority rejected this argument and instead found that the exclusion of pregnancy cannot *per se* constitute proscribed sex discrimination, since this exclusion does not affect women in an area where they are similarly circumstanced with men. This finding, applicable to cases arising under Title VII as well as those under the Fourteenth Amendment, in and of itself demonstrates that this Court has repudiated the EEOC's pregnancy guidelines.

Furthermore, the *Aiello* Court observed that the exclusion of pregnancy fostered the State's legitimate interest in establishing a benefit program that would function in accordance with insurance concepts and in maintaining the fiscal integrity of this program. It is transparent from reading the EEOC's guidelines relevant to this case, that *they* do not permit an evaluation of an insurer's reasons for excluding pregnancy from a benefit plan. Thus, in finding that distinctions involving pregnancy do not constitute proscribed sex discrimination and that an insurer's reasons for excluding pregnancy are a relevant considera-

11. The *amicus* has provided relevant examples of the cost factor in Appendix A of this brief.

12. Section 1604.10, effective April 5, 1972.

tion in determining the legitimacy of this exclusion, *Aiello* has unequivocally repudiated these guidelines.[13]

2. Independent Considerations Demonstrate These Guidelines Are Invalid.

There are additional reasons wholly apart from those considered by the *Aiello* court that establish the invalidity of the pregnancy guidelines. Thus, the guideline is inconsistent with prior opinions, was not issued when Title VII was enacted, and demonstrates none of the thoughtfulness commonly associated with agency expertise.[14]

a. *The Commission's Sex Discrimination Guideline Was Not a Contemporaneous Construction of Title VII, and It Has Not Been Applied Consistently for a Long Period of Time.*

A brief odyssey through the Commission's pronouncements on fringe benefits and pregnancy is necessary to fully appreciate the explicit inconsistency of the Commission's position.

Between 1966, shortly after Title VII became effective,[15] and 1969 the Commission issued a number of opinions announcing how it would apply Title VII when encountering the issue of fringe benefits and pregnancy. These opinions reveal a consistency of approach to this issue and generally informed employers

13. As urged, there is nothing in *Aiello* to suggest that an insurer's reasons for excluding pregnancy will be evaluated *only* when a *governmental* benefit plan is involved. Rather, this Court's reference to "insurance concepts" signifies that this Court will consider an *employer's* reasons for a similar exclusion when private plans are involved. Consequently, whenever an insurer—state or private—advances a rationally supportable basis for his distinctive treatment of pregnancy under his benefit program, this treatment should not inherently constitute interdicted sex discrimination, notwithstanding the Commission's guidelines.

14. These factors commonly have been examined by courts in evaluating the weight to be given to administrative guidelines. *Espinoza* v. *Fara Manufacturing Co., supra; Skidmore, et al.* v. *Swift and Co.*, 323 U. S. 134 (1944); Davis, *Administrative Law Text*, Section 5.03 (1959).

15. Title VII of the Civil Rights Act of 1964 was enacted on July 2, 1964, with an effective date of July 2, 1965.

that *they were not required to provide the same fringe benefits for pregnancy as they provided for illness or injury.*

For example, in an opinion letter, dated November 15, 1966, sixteen months after Title VII became law, the Commission's General Counsel stated:

"Gentlemen:

> You state that under your collective bargaining agreement *male and female employees are granted sick leave with pay. Female employees, however, are granted maternity leaves without pay;* although their services are not terminated. You inquire whether this policy is in compliance with Title VII of the Civil Rights Act of 1964.
>
> *The Commission policy with respect to pregnancy does not seek to compare an employer's treatment of illness or injury with his treatment of maternity,* since maternity is a temporary disability unique to the female sex and more or less to be anticipated during the working life of most women employees. Accordingly, we believe that to provide substantial equality of employment opportunity for both sexes, there must be special recognition for absence due to pregnancy, and for this reason have stated that, generally speaking, a leave of absence should be granted for pregnancy whether or not it is granted for illness. On the other hand, we do not believe that an employer must provide the same fringe benefits for pregnancy as he provides for illness, and, consequently, it is our view that the policy you describe is not in violation of Title VII.
>
> Sincerely yours,
>
> CHARLES T. DUNCAN
> *General Counsel*"
>
> (November 15, 1966)
> (emphasis supplied)[16]

Within sixteen months after the enactment of Title VII, then, the Commission had advised employers that they need not "pro-

16. The General Counsel promulgated virtually identical statements in November and December, 1966. See, e.g., CCH Employment Practices 12-21-66, paragraph 17,304.43.

vide the same fringe benefits for pregnancy as [they provided] for illness . . ." and that the Commission did not require comparable treatment for illness and pregnancy.

The Commission, still demonstrating consistency, maintained this position through 1969. On June 19, 1969, a representative of the Commission announced that the Commission "views pregnancy as a temporary disability, and has not to date equated it with sickness." The Commission then ruled that an employer *may grant maternity leave without pay even though it provided pay for sick leaves.*[17]

The Commission's consistency came to an abrupt halt on April 5, 1972. Then for the first time the Commission declared in an opinion guideline that pregnancy and illness were the same after all for the purposes of an employer's disability policy.[18] The 1972 opinion, of course, has not been consistently applied for a long period of time because it is only the most recent Commission view on the subject, and because it is totally and remarkably

17. CCH, *New Developments Paragraph 8804,* EEOC Attorney Discusses Sex Discrimination and Fringe Benefits Under Title VII, 1964 Civil Rights Act.

18. Whether expressed in a guideline, letter or reported investigation of a specific charge, the Commission's statements and views are merely its *opinions* concerning *inter alia* whether particular conduct violated Title VII. Any so called "EEOC decisions" which may concern the subject in question are not, therefore, decisions at all, but merely reported investigations following a charge, and the report contains the investigators' or prosecutors' opinion that "reasonable cause" does or does not exist to believe Title VII has been violated. Moreover, the so called "decisions" have even less value than the guidelines. While a guideline is the expression of a current opinion by the administrator on the meaning of the statute, a reported investigation states merely that based on the *facts then present* in that case there is or is not *reasonable cause* to believe that the Act has been violated. Arguments or reasons advanced as the case progresses can alter the opinion, and it is of little guidance unless a subsequent case is factually "on all fours." *Robinson* v. *Lorillard Corporation,* 444 F. 2d 791, 801 (CA 4, 1971). Thus, while the arguments in this brief are directed primarily against the Commission's 1972 guideline opinion, these arguments, here and elsewhere, may apply equally to any investigation reports that may represent a change in direction by the Commission.

inconsistent with prior opinions issued over the last several years. Moreover, it is these prior opinions, rather than 1972 opinion, that are contemporaneous constructions of Title VII.[19] What weight then can be given to this 1972 opinion? Applying the criteria of consistent application and contemporaneous construction, the answer is, "none". Moreover, the answer does not change when other relevant criteria are applied.

b. *The Sex Discrimination Guideline Was Not Issued with the Evident Thoughtfulness That Marks Agency Expertise.*

There is no evidence that the new 1972 opinion was formulated with consideration for alternatives or concern for ramifications. Moreover, when the Commission, after several years of consistently applying the Act, abruptly changed its interpretation and consequent application of the Act, it must prove clearly and convincingly that its new interpretation is justified by a change in Congressional policy or by new facts not previously in existence.[20] Only if it meets this explicit proof burden is its new opinion entitled to any judicial consideration. The Commission has offered no such proof here. Indeed, its astonishing and erratic shift belies its obvious claim of expertise.

This much, then, is now clear. In evaluating the weight to give an agency's opinion as to the meaning of a statute, the courts commonly consider a variety of factors. When the Commission's 1972 opinion concerning fringe benefits and maternity or pregnancy is viewed in light of these factors, it is clear that this opinion is entitled to neither weight nor deference.

19. Since the opinion letters referred to in the text represent contemporaneous interpretations of Title VII and are consistent with each other, it is these letters, rather than the guideline in question that are entitled to judicial deference. *Williams* v. *New Orleans Steamship Assn.*, 341 F. Supp. 613 (E. D. La., 1972); *N. L. R. B.* v. *Boeing Co.*, 412 U. S. 61 (1973).

20. *Newman* v. *Delta Air Lines, Inc., supra.* There, the court held that the guideline here in question was not binding on the court because there appeared to be no factual basis upon which the guideline was drawn. The Court also found that the denial of employment benefits to employees on maternity leave did not violate Title VII.

After promulgating the challenged guideline, the Commission apparently hoped to rely upon *Griggs* to secure prompt judicial approval. However, *Griggs is distinguishable* and indeed, supports the view that the guideline in question here is entitled to no weight. In the first place, the statement by this Court in *Griggs* that agency guidelines were entitled to "great deference"[21] must not be overvalued, but rather should be confined to the facts of that case. As the Sixth Circuit in *Espinoza* v. *Farah Manufacturing Co.*, observed:

> "In *Griggs*, the Court found that '(s)ince the Act and its legislative history support the Commission's construction, this affords good reason to treat the guidelines as expressing the will of Congress.' 401 U. S. at 434. Moreover, in that case the Court made an independent analysis of the pertinent legislative history and decided that 'the conclusion is inescapable that the EEOC's construction . . . comports with Congressional intent.' 401 U. S. at 436"[22]

This Court in *Espinoza* adopted the logic of this statement.

Here, unlike *Griggs* and contrary to the court below, there is no evidence whatever that Congress intended an employer to provide fringe benefits for pregnancy on the same terms as he provides benefits for illness or to treat these distinct conditions in the same manner.[23]

21. at 433-434.

22. *Espinoza* v. *Farah Manufacturing Co.*, 462 F. 2d 1331, 1334 (CA 6, 1972).

23. There was little or no legislative history on sex discrimination. *Newmon* v. *Delta Air Lines, Inc., supra.*

However, Congress had ample precedent had it desired to require an employer to treat pregnancy and illness in the same manner. In 1968, considering the Railroad Unemployment Insurance Act of 1946, Congress amended the definition of a day of sickness in that Act to include with respect to "a female employee, a calendar day on which because of pregnancy, miscarriage, or the birth of a child (i) she is unable to work or (ii) working would be injurious to her health."

In addition, Congress had access to arbitrators' decisions which for two decades equated pregnancy and illness and required an employer to apply the same benefit policies to both. (*Middleton Board*

In addition, when *Griggs* was decided the Commission did not have prosecutorial powers. These powers were accorded to the Commission on March 24, 1972. Yet while giving these new prosecutorial powers to the Commission, Congress did not accord to the Commission the power to make substantive law. The relevant legislative history leaves room for no reasonable doubt, since in Section 713(a) of Title VII (42 U. S. C. 2000e-12(a)), the word "procedural" was inserted by amendment on the floor of the House to make clear that the Commission did not have the power to make substantive regulations.[24]

The Commission was rather required to prosecute its cases in a federal district court, and it is the courts that are to interpret the Civil Rights Act and apply the law. There is no doubt that Congress can bestow upon an agency the power to make substantive law. The National Labor Relations Board is an example of an agency to which Congress has given the power to make substantive law. Within the statutory framework of the National Labor Relations Act, the General Counsel and the Board itself have the power to create a substantial body of labor law and courts have justifiably deferred to the Board's expertise.[25] Because the Commission has not been given the power to create substantive law, its guidelines may now inform the public of what the prosecutor consideres illegal, but there is no reason for a court to accord the prosecutor's views a special sanctity or to view them as a body of law having binding force. The

of Education, 56 LA 830 (1971); *National Lead Co.,* 18 LA 528 (1952); *Republic Steel Corp.,* 37 LA 267 (1961).) Nonetheless, despite these decisions, Congress chose not to require that employers treat pregnancy and illness alike in fringe benefit programs.

It is apparent, therefore, that had Congress desired to amend the Civil Rights Act in 1972 or at any time to require employers to treat pregnancy and illness in a similar manner when formulating or implementing benefit programs, Congress would have enacted such an amendment. See footnote 4, *supra.*

24. 110 Cong. Rec. 2575 (1964).

25. The Board's rules concerning what constitutes an effective contract bar to a representation election are one example.

Commission's opinions are just that—its view of what constitutes illegal conduct and a court should treat them as nothing else. The Commission, like the Justice Department, has been accorded only prosecutorial functions, and like the Justice Department cannot fashion the law it elects to present. This is the fundamental distinction between agencies given only prosecutorial roles and those, such as the National Labor Relations Board, to which Congress has given adjudicative and regulatory functions as well as prosecutorial duties. When dealing with the Commission in its new prosecutorial function, the court has the ultimate responsibility to determine the law and it must not abdicate this responsibility to the prosecutor by deference to his guidelines.

CONCLUSION.

For all the foregoing reasons, the *amicus* urges that this Court grant the petition for writ of certiorari.

Respectfully submitted,

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APPENDIX A.

The Chamber has learned of the following facts and presents them to this court for its consideration.

The Health Insurance Association of America and the American Life Insurance Association, representing approximately 500 life and health insurance companies and accounting for approximately 90% of the total private health and life insurance programs in force in the United States, have stated:

> "Under a typical disability income plan with an average group of employees [assuming 38% to 40% are women], the addition of a disability income benefit to cover maternity absences would result in an additional cost to the employer of about 40 to 50 percent of his current costs for the plan." (Joint comments filed in response to a proposal by the Office of Federal Contract Compliance to require that federal contractors provide disability benefits for workers absent from work due to pregnancy, 38 Fed. Reg. 35336-35338 (December 27, 1973); Comment at 9 (February 11, 1974) (Reply brief for Appellant, page 18, *Geduldig* v. *Aiello, supra.*

The experience of one major employer, American Telephone and Telegraph Company, confirms the validity of the foregoing statement. Based upon its calculations, considering the average salary and seniority of eligible women, costs for disability benefits would have been increased by $15,762,663 in 1970-71 and $19,037,330 in 1971-72 if pregnancy has been covered. These estimates include only basic disability costs and exclude such wage related costs as social security, pension, health insurance, etc. The estimate assumes an average pregnancy disability of eight weeks. Costs would have increased respectively to $32,-739,007 and $39,539,070 if payment for the full average maternity leave period of five and one-half months had occurred.

Moreover, if pregnancy had been included in the survey years, 21% of the total days for which disability payments were made would have been attributable to 5% of the eligible women or 2.5% of the employer's working force. No other disability group, even considering both sexes, could generate such a great number of disability days for which benefits would be paid. (Page 11 in Brief of American Telephone and Telegraph Company as *amicus curiae* in *Geduldig* v. *Aiello, supra.*)

The State of California's experience under its unemployment insurance code is consistent with the foregoing. Women presently receive $1.27 in benefits for each $1.00 contributed while men receive $.80. The addition of benefits for normal pregnancy, assuming that contributions did not increase nor benefits decrease, would cause the female benefit rate to increase to $2.33 while the male rate would remain at $.80. (According to the State, in order to preserve the fiscal integrity of its program, contributions would have to increase or benefits decrease; in either event the benefit ratio between men and women would remain the same.) The experience of the State of Hawaii is similar. Coverage of pregnancy under the State's disability program has caused disability premiums for females to increase from $4.00 per month to $8.76 per month. (Reply brief for the Appellant, pages 17-21 in *Geduldig* v. *Aiello, supra.*)